BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	

REPLY COMMENTS OF GRANDE COMMUNICATIONS NETWORKS, INC.

Jeffrey Brennan
Senior Vice President of Business Services
GRANDE COMMUNICATIONS
NETWORKS, INC 401 Carlson Circle
San Marcos, TX 78666

April 22, 2008

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	

REPLY COMMENTS OF GRANDE COMMUNICATIONS NETWORKS, INC.

Grande Communications Networks, Inc. ("Grande"), by its attorneys, hereby files reply comments in the above-captioned proceeding.

I. Summary

As explained herein, Grande joins those parties calling for a uniform rate for all providers of broadband Internet access ("BBIA"), regardless of whatever other services they may provide. However, that rate should be determined using the so-called cable formula rather than the telecommunications formula or another method that would lead to a higher rate. Moreover, the Commission should not modify the telecommunications formula in the manner proposed by several electric utilities and their trade associations, but instead should leave that formula undisturbed. Finally, while Grande does not take a position on the question raised by certain incumbent local exchange carriers ("ILECs"), namely whether the Commission has and should exercise the statutory authority to regulate the rates, terms, and conditions of their access to poles as "providers of telecommunications services," because of the advantages that many ILECs enjoy pursuant to their long-standing joint use and joint ownership agreements with electric utilities, the Commission should ensure that any determination that ILECs are subject to

Commission-regulated rates, terms and conditions does not leave ILECs in a more advantageous position than their competitors.

II. Introduction

Grande is a San Marcos, Texas-based company that, through its certificated affiliates and operating subsidiaries, provides retail and wholesale intrastate and interstate telecommunications services for Texas customers, including residential and commercial BBIA, local and long distance telephone services, and digital cable services. Grande competes with ILECs, such as AT&T, as well as a number of competitive telecommunications carriers, cable companies, and Internet service providers. Grande provides facilities-based services in Austin, Corpus Christi, Dallas, Houston, Midland, Odessa, San Antonio, San Marcos, and Waco, as well as other Texas communities, comprising a broad network of cities and communities. In building and maintaining its own high-capacity fiber-optic networks, Grande relies heavily on its continued ability to attach efficiently and in a timely fashion to poles owned, maintained, and controlled by electric utilities (including cooperatives) and ILECs on terms that are just, reasonable, and non-discriminatory. Grande therefore has a strong interest in the outcome of this proceeding.

III. The Commission Should Adopt a Single Rate for Companies That Provide Broadband Internet Access Services

Increasingly, telecommunications carriers and cable operators are competing for the same customers, not just for voice services, but for video services as well as BBIA. But, as requires no further explanation by Grande, under Section 224 of the Communications Act of 1934, as amended (the "Act") and the Commission's implementing regulations, cable companies that do not provide telecommunications services are subject to pole attachment rates under a formula that invariably – indeed, by design – yields a lower rate than the formula used for telecommunications carriers. Given that the Commission has in only very limited circumstances

to date found that IP-enabled voice services are "telecommunications services," many cable companies with whom Grande competes continue to maintain that their IP-enabled voice services are not telecommunications services and therefore have continued to pay a lower pole attachment rate than Grande. Grande does not necessarily disagree with its rivals' assessments about the unregulated nature of their voice services (under Title II). However, there is no doubt that payment of a lower rate by these competitors gives them a cost advantage over Grande under the current regulatory framework for not just one, but *three* services – voice, video, and BBIA.

Absent an amendment to the Act (or possibly an exercise of forbearance), the Commission does not appear to have the authority to eliminate the disparity between the Congressionally-mandated cable video service and the telecommunications carrier pole attachment rates.[1] Several parties contend in their comments that the Commission has the authority under Section 224 of the Act to regulate rates for attachments made by providers of BBIA and adopt a uniform rate for all providers of BBIA service, whether or not they also provide video or telecommunications services.[2] Grande supports such an outcome. Adopting a uniform rate will eliminate disparity and promote efficient competition in today's marketplaces, as all competitors such as Grande, most CLECs, and virtually all cable companies rely upon the

---

1 47 U.S.C. § 224 (d) and (e).

2 *E.g.,* Comments of Knology at 5; Comments of Time Warner *et al.* at 5-14; Comments of Alabama Power *et al.* at 14-15. *See also NCTA v. Gulf Power,* 534 U.S. 327. 335-336 (2002). The Commission found in its *Wireline Broadband Order* that BBIA was an information service, and thus neither cable nor telecommunications service. *The Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 FCC Rcd 14,853 (2005). The statue is silent on method to be used to set pole attachment rates for providers of BBIA, whether standing alone as bundled with cable or telecommunications services or both.

pole infrastructure of utility companies and ILECs to deploy and maintain their networks and provide their competing BBIA and other services.[3]

Moreover, Grande submits the uniform rate for providers of BBIA should be at the level of cable provider pole attachment rates,[4] not at a rate equal to or similar to that adopted under the telecommunications carrier pole attachment formula which is what the Commission tentatively proposed in the *Notice of Proposed Rulemaking.* Generally speaking communications attachments are comparable regardless of what services are being provided over the facility – cable, telecommunications, or BBIA, or any combination of them.[5] Accordingly, the principal requirement for the attachments of providers of BBIA is that the rate be compensatory. The cable rate has been found by the Commission and the courts to be compensatory.[6] The proponents of a higher uniform BBIA attachment rate, *i.e.*, the utilities and their trade associations, have failed to demonstrate that the agency and the judiciary got it wrong.

Unfortunately, the *Notice of Proposed Rulemaking* inaccurately suggested that the cable formula does not include an allotment for unusable space on a pole, as does the telecommunications formula.[7] But in fact it does. Although the "space factor" is the ratio of the space occupied by an attachment – taken to be 12 inches – to the total usable space, that result is multiplied by the average net cost of an *entire bare pole,* such that the proportion of the usable *and unusable* space that a cable attacher pays for is the same. Once the cable formula is properly

---

3 A single uniform rate for BBIA providers would also promote the development of advanced services and help carry Congress's mandate to the Commission under Section 706 of the Act.

4 *Accord, e.g.,* Comments of Charter Communications at 9; Comments of Knology at 6; Comments of NCTA at 21-22.

5 The exception may be the heavier attachments of the ILECs which have been installed typically with more sag and therefore effectively require more of the usable space on the poles in order to ensure adequate clearances with other attachers.

6 *See, e.g., Alabama Power Co. v FCC*, 311 F. 3d. 1357 (11th Cir. 2002).

7 *Notice of Proposed Rulemaking* ¶¶ 19 and 22.

examined, there is little doubt that this alleged "flaw" simply does not exist. The propriety of the cable rate for BBIA provider attachers is supported by the fact that, within those States that have certified to the Commission that they regulate pole attachment rates, terms, and conditions and that have adopted a BBIA pole attachment rate, the rate most commonly adopted is the cable pole attachment rate used in those States. Many other States has simply adopted a single rate for cable providers and telecommunications carriers.[8]

IV. The Commission Should Not Modify the Telecommunications Carrier Attachment Formula

A number of commenters from the electric utility industry suggest that the Commission should modify the telecommunications carrier pole attachment formula in a variety of ways. Specifically, they contend that the Commission should:

- Not count the electric utilities as one of the attachers when determining the average number of attachers;[9]
- Lower the presumed number of attachers in the Commission's Rules; [10]
- Count the 40 inches of safety space between electric company and cable/communications attachments as unusable space; [11] and
- Eliminate the factor in the formula which subjects only 2/3 of the unusable space to reimbursement by all attachers. [12]

---

8 The comments demonstrate that many States that have certified to the Commission that they regulate pole attachment rates, terms, and conditions have recognized that their cable rate is appropriate for providers of BBIA. *See, e.g.,* Comments of Comcast at 21-22 (discussing the rates adopted in California, Connecticut, Oregon, Alaska, and New York); Comments of Time Warner at 7-11 (eleven states have adopted a single rate for cable providers and telecommunications carriers).

9 Comments of Idaho Power Company at 17; Comments of UTC at 25-27.

10 Comments of Edison Electric Institute and the Utilities Telecom Company at 45 (reduce the presumption to three average attachers in all areas); Comments of Idaho Power Company at 16-17; Comments of UTC at 23-24.

11 Comments of Idaho Power Company at 15; Comments of UTC at 27; Comments of Alabama Power, *et. al* at 24-25.

12 Comments of Ameren Services Co. *et al.* at 23

Taken together, Grande expects these changes would likely increase the telecommunications carrier pole attachment rate it pays by 25% or more.[13] This would only exacerbate the already substantial differential between the rates the cable providers and telecommunications carriers pay. Time Warner states that telecommunications carriers now pay approximately two-to-three times more than cable carriers for pole attachments.[14] This is consistent with Grande's own experiences. Consequently, the proposed changes advocated by many of the electric utility commenters would only increase that disparity, handicapping the telecommunications carriers substantially more.

Moreover, apart from exaggerating the discrepancy between cable companies and telecommunications carriers that compete directly with each other, the changes the electric utilities urge the Commission to make are not merited in their own right. First, electric utilities should count as an attacher because they make the primary use of the pole. Unlike competitive telecommunications carriers and cable companies, which typically have only one attachment on a pole occupying approximately 12 inches, in Grande's experience, electric companies often have multiple attachments which can, on average, occupy four to five feet of the usable space (ignoring the 40" of safety space required by the NESC). Moreover, the 40" safety zone between electric company and communications provider attachments is required over and above the four to five feet *because of the nature of the electric company attachments*, not because of the cable of communications companies. Accordingly, because the average number of attachers factor operates to allocate the unusable space, it is clear that the electric company should be included as

---

13 Idaho Power Company projects that the first three adjustments discussed above will raise the rates under the Commission's telecommunications formula from $13.33 to 17.18. Comments of Idaho Power Company at 19. The adjusted rate using three attachers increases the rate by roughly 80% above the current Idaho Power Company rate (in urban areas) using the Rules' presumption of five attachers. *Id.*

14 Comments of Time Warner *et. al.* at 2

an attacher, because the pole primarily and predominately serves the electric company. To exclude the electric company as an attacher for purposes of calculating the average number of attachers would be to force telecommunication carrier attachers to shoulder a disproportionate amount of the costs of the unusable space.

Second, the Commission should not change its rebuttable presumptions of the average number of attachers. In Grande's experience in the markets in which it operates, the presumptions provide a sound *lower* estimate of the numbers of attachers in rural and urban areas. Indeed, in some sets of poles in areas in which Grande has deployed its network, Grande has had occasion to demonstrate that the average number of attachers exceeded the presumptions. Grande is aware that some commenters provide data that the average numbers of attachers in the presumptions are too high, and in some markets that may be the case. But where that is the situation, Grande submits that, under the Commission's Rules, the utility can already use what it believes is the actual average number of attachers on its poles in calculating its rates.[15] Should the attacher contest the accuracy of the presumptive number determined by the utility, the utility will have ample opportunity to demonstrate to an attacher, the Commission, or a court, based on actual data *in its markets*, that the average number of attachers should be less than the presumptive numbers in the Commission's Rules.

Third, the Commission, in 2001, confirmed a decision it had made several times previously that the 40" safety clearance space between electric utility attachments and communications attachments should *not* be considered part of the unusable space for purposes of

---

15 *See* 47 CFR § 1.1417(d) (process by which a utility may establish its own presumptive average number of attachers at level different than those in the Commission's Rules).

calculating pole attachment rates under the telecommunications carrier rate formula.[16] The electric utilities that press for this change have not offered any compelling reasons for the Commission to abandon its earlier reasoning and reach a different result. Their arguments are largely the same as those the Commission previously rejected. Now, as then, "[i]t is the presence of the potentially hazardous Electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers."[17] The *electric companies* continue to use that space, as the Commission previously found, and no change is warranted.

Fourth, the Commission appropriately included a factor of 2/3 of the unusable space in the telecommunications pole attachment rate formula, rather than making 100% of the unusable space subject to allocation to other attachers (in addition to the utility). This was required by Section 224(e)(2) of the Act.[18] Moreover, Congress's determination in this regard is the right one. As noted above, electric companies, on the whole, make far more use of a pole than attaching telecommunications carriers. For example, if there is only one attacher in addition to the electric company, as a result of the factor, 2/3 of the unusable space will, in effect be allocated to the electric company and 1/3 to the attacher, even though the electric company makes use of far more than twice as much space as the communications attacher.[19]

---

16 *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of The Telecommunications Act of 1996,* 16 FCC Rcd 12103, ¶ 51 (2001). *See also Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, ¶¶ 20-22 (2000).

17 *Id.* at ¶ 22.

18 47 U.S.C. § 224(e)(2).

19 A cable company or telecommunications carrier is presumed to take up 12 inches of space. As noted above, in Grande's experience, electric utilities typically occupy an average of 4 to 5 feet per pole.

In the case where there are, say, four additional telecommunications carrier attachers, each with one attachment occupying one foot of the usable space, the 2/3 factor will provide that the communications company attachers are allocated 8/15[20] of the unusable space, whereas the electric company is allocated only 7/15.[21] As explained above, the electric company makes use of four or five feet on average. The four attachers in this scenario will together use no more space than the electric company, on average, and possibly less. Accordingly, in this second scenario, the electric company actually will be allocated a minority portion of the unusable space as compared to the other four attachers, such that the use of the 2/3 space factor is still in favor of the electric company. When one takes into account the 40" safety space into the foregoing examples, space which the Commission found is actually *used by the electric company*, it becomes clear that the 2/3 space factor leads to excessive compensation to the utility companies given the relatively small amount of the space used by a communications attachment. Therefore, the Commission should not modify the telecommunication carrier pole attachment formula to allocate 100% of the unusable space to additional attachers.

V. In the Event the Commission Finds That ILEC Attachments Are Subject to Section 224, the Commission Must Not Allow ILECs to Pick and Choose Rates, Terms, and Conditions

In the *Notice of Proposed Rulemaking*, the Commission inquired whether ILECs, as "providers of telecommunications services," as opposed to "telecommunications carriers" (a definition from which they are excluded under Section 224 of the Act) should be entitled to rates, terms, and condition that are just and reasonable and nondiscriminatory where the ILECs already have access to utility poles.[22] Grande does not take any position at this time on this legal issue,

---

20 $2/3 \cdot (4/5) = 8/15$.

21 $1/3 + 2/3 \cdot (1/5) = 7/15$.

22 *Notice of Proposed Rulemaking* ¶¶ 23-25.

although the comments in opposition suggest that the position of the ILECs may strain the limits of statutory construction.[23] However, assuming *arguendo* the Commission were to find that it has the authority to regulate the rates, terms, and conditions of ILEC attachments to electric utility poles under Section 224, the Commission should not dictate in isolation that the ILECs are entitled to rates calculated under the telecommunications carrier attachment formula or any BBIA provider formula that the Commission may adopt in this proceeding. Rather, if ILECs desire to have the Commission assert jurisdiction over the rates that electric utilities can assess, ILECs should not only *be able to take* the same rates that non-ILEC telecommunications carriers pay standing alone, *they should be required to take that rate as well as the same set of terms and conditions to which their competitors are subject.*

Otherwise, if the Commission finds that it has jurisdiction over ILEC rates, terms, and conditions, this ruling will confer an unfair improper advantage on ILECs that the Congress did not intend to confer on any subset of attachers subject to Section 224 and the Commission's implementing regulations. As the initial comments make clear, ILECs have historically operated pursuant to joint use and joint ownership agreements entered into with electric utilities. These agreements confer advantages in many cases on ILECs that CLECs and cable providers do not enjoy, such as ease of access and effectively a reservation of space on the poles, which in some cases ILECs may be able to sublease, even though they are not the owner.[24] In some situations, ILECs may not even pay for their access to joint use or joint ownership poles. If an ILEC can choose whether to remain under the joint use or joint ownership agreement, in whole or in part, *or* to become subject to the Commission's Rules, again in whole or in part, the ILEC will be able to choose the most advantageous combination of rates, terms, and conditions derived from both

---

23 *See, e.g., Comments of EEI/UTC* at 113-17.

24 *See* Comments of Comcast at 24-28

worlds, a flexibility its competitors do not have. Consequently, if the Commission believes that there is merit to the arguments that as "providers of telecommunications services," ILECs are entitled to just, reasonable, and nondiscriminatory rates, terms, and conditions under Section 224, the Commission should find that ILECs are *required* to become subject to nondiscriminatory those rates, terms, and conditions on utility-owned poles.

VI. Conclusion

In conclusion, for the foregoing reasons, the Commission should adopt a uniform attachment rate for broadband Internet access providers that applies regardless of what other services the provider offers. That rate should be established using the current cable attachment rate formula. Moreover, the Commission should not make the adjustments to the telecommunications carrier rate formula propounded by some commenters from the electric utility industry. Finally, if the Commission determines that ILECs, as "providers of telecommunications services," are entitled to just, reasonable, and nondiscriminatory rates, terms, and conditions under section 224, the Commission should require ILECs to attach on the same rates, terms, and conditions to which their competitors are attaching, rather than allowing ILECs to pick and choose among Commission regulated rates, terms and conditions and those provisions of their joint use and joint ownerships agreements with electric utilities.

Respectfully submitted,

GRANDE COMMUNICATIONS NETWORKS, INC.

By: Jeffrey Brennan

Jeffrey Brennan
Senior Vice President of Business Services
GRANDE COMMUNICATIONS NETWORKS, INC
401 Carlson Circle
San Marcos, TX 78666

April 22, 2008